

No. 50218-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN VIET HUYNH

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy
Cause No. 16-1-01620-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether substantial evidence supported the jury's finding that Huynh is guilty of residential burglary.
2. Whether the trial court abused its discretion when it authorized the use of leg restraints at trial and whether that decision prejudiced the defendant.
3. Whether the defense counsel's failure to object to a line of questioning at trial denied the appellant effective assistance of counsel.

B. STATEMENT OF THE CASE.

1. Substantive Facts

John Viet Huynh has fourteen felony convictions and five gross misdemeanor convictions. RP 25. At the time of his arrest in September of 2016 he had warrants out of King County for eluding and possession of a stolen vehicle. RP 1/23 8.

On the evening of September 15, 2016 and into the early morning of September 16, 2016 Mark Morgan's brand new Chevy Colorado was stolen from his garage. At approximately 11:00 pm Mr. Morgan went up to bed and his son, who had been in and out of the house packing his own vehicle for a trip the next day, came pounding on his door, inquiring about the location of his new truck. RP 158. Mr. Morgan then ran down to the garage and saw that his truck had been stolen. RP158. Mr. Morgan began tracking his car

via his OnStar app on his cell phone, and his son called the police.
RP 160.

Sergeant Landerwherle responded to the call and went to the location provided by OnStar that Mr. Morgan told him. RP 69. Sergeant Landerwherle saw the truck at the end of a residential street, RP 70, and when they got to a dead end, two people got out of the vehicle and fled in opposite directions. RP 71. Sergeant Landerwherle requested Officer Mize and his K-9 James to report to the location because of the fleeing suspects. RP 104. Sergeant Knight and Officer Dumont also arrived at the scene. RP 75. The K-9, James led the officers to Brandon Chinvadong who was hiding in a backyard, RP 77. Officer Mize ordered Chinvadong to surrender or else he would release the dog. RP 109. Chinvadong surrendered. RP 109. Chinvadong had shoes and headphones that belonged to the victim when he was arrested. RP 156.

Sergeant Landerwherle then spotted the defendant, John Huynh in another backyard. RP 112. In Huynh's possession at that time was a pair of shoes, and a Titus Will bag that had a Gerber multi-tool, shaved keys, key fobs a USB chord, and headphones inside. RP 128. The victim claimed that the Titus Will bag, Gerber multi-tool, USB chord and the headphones belonged to him. RP

129. Huynh also had a string attached to his belt loop with a ceramic tip from a spark plug. RP 132. The string had been ripped and the remainder of the string was found in the vehicle. RP 132. Huynh was taken into custody and read his Miranda warnings by Officer Dumont. RP 112, 126. Huynh then waived his Miranda warnings, and after Sergeant Landerwpherle encouraged him to cooperate, RP 82, Huynh admitted that he had been the passenger in the vehicle. RP 127. Huynh also stated that he had just been picked up by Chinvadong from a friend's house. RP 127. When Officer Dumont went to the house Huynh had indicated no one came to the door to confirm his story. RP 127.

2. Procedural Facts

Huynh was charged with one count of residential burglary and one count of theft of a motor vehicle. CP 4, 110. Both counts were as either principal or an accomplice. At trial the State moved for the defendant to appear at trial in leg restraints. RP 37. The court allowed for restraints to be worn during trial. RP 43. The jury returned a guilty verdict on both counts, RP 243-47, and Huynh timely appealed. CP 122-34.

C. ARGUMENT.

1. Substantial evidence, when viewed in a light most favorable to the State, supported the jury's finding of guilt on the charge of residential burglary.

The trial court did not err in accepting the jury's guilty verdict on the burglary charge. The appellate court should affirm the burglary conviction. A residential burglary occurs when a person enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025. In determining if a residential burglary occurred, courts give weight to the testimony of "the person with possession . . . of the property over the alleged burglar to determine if the accused's presence or entry [was] unlawful." State v. J.P., 130 Wn. App. 887, 894, 125 P.3d 215 (2005). A dwelling is defined as "Any building or structure . . . which is used or ordinarily used by a person for [habitation]." RCW 9A.04.110. A person commits a residential burglary when he lacks permission from the owner to be on the premises. J.P., 130 Wn. App. at 896. Only the person who resides in or otherwise has authority over the property may grant permission to enter or remain on the premises. Id.

“Substantial evidence is defined as evidence of a kind and quantity that will persuade an unprejudiced, thinking mind of the existence of the fact to which the evidence is directed.” State v. Tharp, 27 Wn. App. 198, 203, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591 (1981). “The function of an appellate court is only to assess that there was substantial evidence from which the trier of fact could infer that the burden of proof had been met and that the defendant was the one who perpetrated the crime.” State v. Johnson, 12 Wn. App. 40, 45, 527 P.2d 1324 (1974). “The review of the sufficiency of the evidence to support the decision of the judge or jury is limited to a determination of whether the state produced substantial evidence of circumstances from which the facts to be proved could reasonably be inferred. The conclusion of the trier of fact must stand if the record contains substantial evidence of each element of the crime charged.” Id. at 47.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In Washington, “proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary . . . It is, however, also well established that proof of such possession, if accompanied by

'indicatory evidence on collateral matters,' will support a burglary conviction." State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982) (quoting State v. Garske, 74 Wn.2d 901, 903, 447 P.2d 167 (1968)). Indicatory evidence includes possession of recently stolen property, and "flight or presence of the accused near the scene of the crime." Mace, 97 Wn.2d at 843 (quoting State v. Portee, 25 Wn.2d 246, 254, 170 P.2d 326 (1946)).

In State v. Garske, a jewelry store was burglarized, but the burglary was not discovered until about 8 a.m. the next morning. Prior to the discovery, Garske was stopped by a patrolman a short distance from the jewelry store around midnight. Some of the jewelry from the burglary was found near where the Garske was had been questioned. State v Garske, 74 Wn. 2d at 902. Officers later searched the home of a woman who Garske had been staying with and found two wristwatches in a tennis shoe. Garske acknowledged that the shoe was his but denied knowledge of the watches. Id. The Washington State Supreme Court found that because the defendant denied knowledge of the watches, other stolen property was found near his residence, he was placed near the scene of the crime, and he had no explanation of his possession and because he had a grease spot comparable to

grease found at the store, corroborative evidence supported his conviction. Id. at 903.

In State v. Mace, the victims, Mr. and Mrs. Swift were awakened by their apartment manager who had Mrs. Swift's purse that a neighbor had found outside. Mace, 97 Wn.2d at 841-42. The Swift's noticed that a window and glass door had been opened. Id. at 842. Mrs. Swift was missing several credit cards, and Mr. Swift was missing his wallet. Id. Mrs. Swift's credit card was used in a neighboring city and Mr. Swift's wallet was found in a trash can, inside a McDonald's bag near the location where the card was used. Id. The McDonald's bag had the petitioner's fingerprints on it. Id. The next day Mrs. Swift's card was used again, this time the machine seized the card. Id. In the nearby trash can was a receipt that had the petitioner's fingerprints on it. Id. The State was only capable of proving that the petitioner had possession of the property, not that he stole it, as a result the burglary conviction was reversed. Id. at 845.

This case bears more similarity to Garske than it does to Mace. Mark Morgan testified that he had last seen his Chevy Colorado about 11:00 p.m. and the truck would have been unattended for 20 to 25 minutes. RP 159-160. Mr. Morgan went to

bed and his son came frantically pounding on his door and said 'where is your truck.'" RP 158. Mr. Morgan and his son accessed OnStar and relayed the position of the truck to dispatch. RP 161. Sgt. Landerwehrle located the truck at 12:20 a.m., less than five minutes drive time from the Morgan residence. RP 70. Sgt. Landewehrle watched as Huynh fled from the stolen vehicle. RP 71.

When Officer Mize and Officer Dumont located Huynh, he was attempting to hide in the backyard of a residence. RP 125. Also, when Huynh was arrested he had numerous items on his person, or near his person, that were stolen from the vehicle. RP 129. Officer Dumont questioned Huynh, who stated that he was the passenger in the vehicle and said that he ran from the vehicle because he was following his friend. RP 127. He stated that he had just been picked up from 300 Lanyard Drive; however, when Officer Dumont went to the address that Huynh told him he had been picked up from, nobody came to the door to validate his story. RP 127.

Near Huyhn, Officer Dumont located a Titus Will Bag with some shaved keys and two key fobs in it. RP 128. The victim later identified the Titus Will bag as having come from his vehicle. RP

128-129. Officer Dumont testified that shaved keys are used to “have the opportunity to steal multiple types of cars.” RP 129. Officer Dumont further testified that the OnStar box in the vehicle was broken, and appeared as though someone had attempted to “to disable it so that the tracking doesn’t work.” RP 139-140.

Unlike in Mace, where the only evidence was the petitioner’s fingerprints, here Sergeant Landerwehrle witnessed Huynh in the stolen vehicle, and in possession of property that was inside the vehicle. RP 71, 129. The vehicle was located shortly after Morgan had noticed it missing, and Morgan testified that the vehicle was only unattended for 20-25 minutes before it was noticed as missing. It was apparent from the condition of the OnStar box in the vehicle that the passenger had been attempting to disable the tracking system, and Huynh was found near shaved keys which are commonly used in motor vehicle thefts. Much like Garske, Huynh had no explanation for having the property in his possession. Instead, he provided a statement that he had just been picked up, which Officer Dumont could not verify, and stated that he only ran to follow his friend.

Mace states that proof of possession, along with indicatory evidence, supports a burglary conviction. Mace, 97 Wn.2d at 843. It

is evident from the facts of this case that Huynh was in possession of the stolen vehicle. He admits to having been the passenger in the car. RP 127. Furthermore, there is indicatory evidence, in the form of Huynh fleeing the scene, supporting the burglary conviction. When Huynh was arrested on his belt loop was a piece of broken ceramic from a spark plug tied to a string that had been ripped, and the other half of the string was found in the vehicle. RP 132. Sergeant Landerwhele testified that the ceramic is used by individuals in their efforts to steal vehicles as it is easier to break car windows. RP 85-86. Huynh had all of the tools necessary to steal cars when he was arrested. He had shaved keys, and spark plugs with ceramic tips. A rational finder of fact could find, and did find, that Huynh is guilty of burglary as either the principal or as an accomplice to Chinvadong. This court should affirm Huynh's conviction for residential burglary.

2. The trial court did not abuse its discretion in authorizing the use of leg restraints during trial and the use of the restraints did not prejudice Huynh at trial.

The trial court's decision to have Huynh appear at trial in leg restraints was not error. This court should affirm the trial court's decision that the State was justified in moving for leg restraints, and the trial court did not err in granting the movement. A defendant has

the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), review denied, 145 Wn.2d 1016, 41 P.3d 482 (2002). “It is fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public.” State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). The trial court’s decision to restrain a defendant is reviewed for abuse of discretion. State v. Turner, 143 Wn.2d 715, 724, 23 P.3d 499 (2001); State v. Walker, 185 Wn. App. 790, 803, 344 P.3d 227, review denied, 183 Wn.2d 1025 (2015). Shackles and handcuffs are not per se unconstitutional. In re Pers. Restraint of Davis, 152 Wn.2d 647, 694, 101 P.3d 1 (2004).

The right to appear in court without restraints is not unlimited. State v. Finch, 137 Wn.2d 792, 846, 975 P.2d 967 (1999). A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. State v. Damon, 144 Wn.2d 686,

691-92, 25 P.3d 418 (2001). Regardless of the type of proceeding, and whether or not a jury is present, it is for the court, not jail or prison administrators, to determine whether and how restraints will be used. State v. Walker, 185 Wn. App. 790, 797, 344 P.3d 227 (2015). The standard of review is abuse of discretion, recognizing that the trial court has broad discretion. Hartzog, 96 Wn.2d at 401.

The court in State v. Hutchinson found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). Similarly, the court in State v. Jennings held that the stun gun the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61. The court in State v. Damon found that the jury must have observed the restraint chair in which the defendant was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

The jury will not be prejudiced against a defendant wearing restraints, nor will restraints impinge on the presumption of innocence, if the jury never knows they are there. In this case, Huynh was wearing leg restraints that were completely concealed by his clothing. RP 30. The restraints were the least restrictive

restraints without adding an additional officer. RP 34. The court factored into its decision Huynh's exhaustive criminal history that includes convictions for eluding, and escape. RP 41. Like in the case examples above, the restraints used here were not visible to the jury, and did not prejudice Huynh in any way. The trial court did not abuse its discretion in granting the State's motion for Huynh to appear in restraints at trial. The appellate court should affirm the decision of the trial court.

3. The defendant was not denied effective assistance of counsel at trial.

The defendant was not denied effective assistance of counsel at trial. The appellate court should rule that the defendant received effective assistance at trial. Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d

1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 689; Hendrickson, 129 Wn.2d at 77-78; McFarland, 127 Wn.2d at 334-35.

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In this case, Huynh argues that he was denied effective assistance of counsel because of a failure to object to a line of questioning towards Sergeant Landerwpherle. The appellant argues that “his counsel’s failure to object to inadmissible evidence pointing out to the jury that the defendant had refused to speak wasn’t being truthful . . . undermines confidence in the jury’s verdict on this charge.” Brief of Appellant 22. This argument is substantially flawed, because the appellant never invoked his Fifth Amendment rights. Officer Dumont read him his Miranda warnings, RP 126, and Huynh subsequently waived those rights, choosing to speak with the police. RP 127. Evidence of post arrest silence is inherently ambiguous. Doyle v. Ohio, 426 U.S. 610, 617, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976); State v. Fricks, 91 Wn.2d 391, 395-396, 588 P.2d 1328 (1979). It is only when a prosecutor unfairly uses evidence of post-arrest silence against a defendant that his due process rights to a fair trial are violated. State v. Johnson, 42 Wn. App. 425, 432, 712 P.2d 301 (1985).

Huynh's argument revolves around a single statement in which Sgt. Landwehrle testified, "My understanding is he wasn't providing information to Officer Dumont. Officer Dumont did an initial interview with him. So I went over and encouraged him to cooperate and to be honest with Officer Dumont." RP 81-82. In State v. Johnson, the Detective was asked about the defendant's understanding of his *Miranda* rights, and over objection, testified that he had asked the defendant if he wanted to discuss the case and the defendant stated he did not wish to discuss it." Johnson, 42 Wn.App. 427. The Court stated, "we believe the police officer's testimony did not highlight or call attention to defendant's post-arrest silence in such a fashion or to such a degree as to penalize a defendant for exercising his right to remain mute." Id. at 431-432. In this case, the question to Sgt. Landwehrle was merely laying foundation for Sgt. Landwehrle's observations and later testimony from Officer Dumont about his questioning of Huyhn. RP 82. Unlike the defendant in Johnson, Huyhn, never invoked his constitutional right to remain silent. RP 126.

The appellant's counsel at the trial court did not fall below the standard of a reasonably prudent attorney, and the court of appeals should rule that his counsel was not ineffective. "A lawyer

may properly make the tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The defense attorney's lack of objection to a single question at trial does not diminish his performance to less than a reasonably prudent attorney. Additionally, Sgt. Landwehrle was not commenting on Huynh's invocation of his right to remain silent because Huynh never invoked the right. Defense counsel's decision not to object was tactically made, with the knowledge that Officer Dumont was still to testify and defense counsel would have ample opportunity to question him regarding Huynh's statements to him. Even if this Court believes that defense counsel should have

made such an objection, no prejudice can be shown from the failure to do so. As in Johnson, “under the circumstances of this case, defendant’s post-arrest silence was not used unfairly by the prosecutor to deprive the defendant of his due process right to a fair trial. There is no reasonable probability that the outcome of the trial would have been different, and the error, if any, was harmless.” State v. Johnson, 42 Wn.App. at 432.

D. CONCLUSION.

For the reasons stated above, the substantial evidence supported the jury’s finding that Huynh committed residential burglary. The trial court did not abuse its discretion in authorizing leg restraints during trial and that decision did not prejudice Huynh.. Also, the appellant was not denied effective assistance of counsel at the trial level. The State respectfully requests this court to affirm Huynh’s convictions for residential burglary and theft of a motor vehicle.

Respectfully submitted this 9 day of August, 2017.



Joseph J.A. Jackson, WSBA# 37306
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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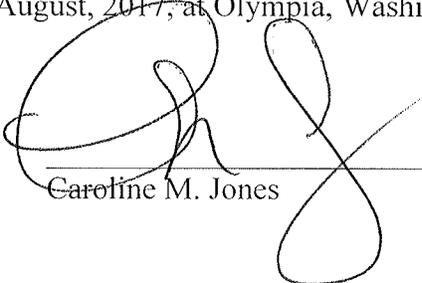
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of August, 2017, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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